KEWANGAN UTAMA BHD A

v.

LO KIEN FOOK

HIGH COURT SABAH & SARAWAK, KUCHING B
HAMID SULTAN ABU BACKER JC
[ORIGINATING SUMMONS NO: KG 152-1993/II]
28 MARCH 2007

LAND LAW: *Charge - Order for sale - Application by appellant for refund of purchase price on ground that vacant possession of property not given by respondent - Whether respondent under no obligation to deliver vacant possession unless terms of sale expressly say so - Whether appellant filed application without legal basis - Whether application frivolous and an abuse of process of court - Land Code (Cap 81) (Sarawak), ss. 148(2)(a), (c), 150, 151* C D

This was an appeal by the successful bidder in Originating Summons No. KG 152 of 1993/II (subject matter of a foreclosure proceeding and statutory sale by financier) against the decision of the learned Deputy Registrar, whereby the appellant's application for an order for refund of the purchase price on the ground vacant possession had not been given by the plaintiff/respondent was dismissed with costs. The respondent opposed the appeal, contending the court ordered that the proceeds from the said auction sale in the sum of RM107,000 be paid out according to a certificate under s. 151 of the Land Code (Cap 81) (Sarawak) ('SLC'), and that contrary to the said order, the appellant made this application for the refund of the purchase price. Since an order for payment out had already been made by this court, that by itself was sufficient to defeat the application as the order was still subsisting and yet to be fully complied with. Therefore, this court could not possibly grant another order for payment out without setting aside the previous order. The real issue in this appeal that needed to be dealt with was whether under a judicial sale pursuant to the SLC, there is an obligation for the chargee to give vacant possession when admittedly there is nothing in the condition of sale that the chargee is under an obligation to deliver vacant possession. The determination of this issue would require the consideration of the meaning of "encumbrances" and to what extent it applied in this appeal in relation to vacant possession, as the appellant asserted that the sale of the property was subject to the term "free of all encumbrances" and, in consequence, E F G H I

argued that the respondent had a duty and an obligation to give vacant possession before the appellant was obliged to perform his part of the bargain.

Held (dismissing the appeal):

(1) The term "encumbrance" has no relationship to possession and the appellant by his own efforts had not produced any authority to show that "encumbrance" means free from possession of third parties. The term "encumbrance" must be related to the quality of the title which may diminish the value of the property and not any obstruction to the enjoyment of the property as in this case, where the appellant was saying that vacant possession had not been given by the respondent. Thus, it is clear that "free of all encumbrances" does not mean that the chargee must give vacant possession unless the terms of sale expressly say so. In this case, the sale was pursuant to s. 148(2)(c) and not s. 148(2)(a) of the SLC, and it was clear that the respondent had elected to go for judicial sale and not for other remedies in the section. The order for sale was granted and the property was purchased by the appellant pursuant to s. 150 of the SLC. In consequence, the appellant and the respondent were subject to all the statutory terms related to the sale, and could not rely on common law principles relating to the terms and conditions of purchase unless they had been expressly agreed to by the parties. In this case, there was no such agreement to support the appellant's contention that he was entitled to vacant possession of the property in addition to the transfer. The consequence of the sale by auction was that the respondent became a bare trustee for the appellant and his interest in the property was only the sale price subject to s. 151 of the SLC. (paras 13, 17, 18, 19, 20)

(1a) An order of court under a judiciary or statutory sale must be respected and must be complied with, failure of which may lead to contempt proceedings to compel the recalcitrant party to perform his part of the bargain, more so when parties have voluntarily by conduct dragged the court to aid them in a private transaction. Any non-compliance with the statutory term of sale requires the court to make, if necessary, punitive orders to ensure compliance, and the

court will not hesitate to take pro-active steps to dismiss frivolous applications *in limine*, provided the aggrieved party approaches the court without delay. In this case, the appellant had voluntarily bid for the property and consented to various orders of the court. Without performing the said order or making an application for stay of the order, the appellant filed the application for refund without legal basis (even under the law of contract), thereby turning the character of the application into one that was frivolous, vexatious and an abuse of the process of court. (paras 24 & 25)

Case(s) referred to:

Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd [1995] 4 CLJ 197 HC ***(refd)***

Aik Ming (M) Sdn Bhd v. Chang Chin Chuen [1995] 3 CLJ 639 CA ***(refd)***

Aminah Abas v. Pentadbir Tanah Daerah Kuantan [2004] 5 CLJ 1 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bhagwan Singh & Co Sdn Bhd v. Hock Hin Bros Sdn Bhd [1986] 2 CLJ 224; [1986] CLJ (Rep) 300 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank [1995] 4 CLJ 283 FC ***(refd)***

Cook v. Taylor [1942] 1 Ch 349 ***(refd)***

Cumberland Consolidated Holdings, Ltd v. Ireland [1946] All ER 284 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***

Hotel Ambassador Sdn Bhd v. Seapower Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA

Lysaght v. Edwards [1876] 2 Ch D 499 ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(refd)***

Malaysian Building Society Bhd v. Univen Sdn Bhd [2002] 7 MLJ 501 ***(refd)***

Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 CLJ 236 CA ***(refd)***

OH Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 ***(refd)***

Pan Wai Mei v. Sam Weng Yee & Anor [2006] 1 CLJ 914 CA ***(refd)***

Punca Klasik Sdn Bhd v. All Persons in occupation [1995] 4 BLJ 337 HC ***(refd)***

Re Crosby's Contract [1949] All ER 830 ***(refd)***

Sheriffa Taibah Abdul Rahman v. Lim Kim Som [1992] 2 SLR 516 ***(refd)***

Singapore Woodcraft Manufacturing Co Pte Ltd v. Mok Ah Sai [1979] 2 MLJ 166 ***(refd)***

A *Sop Plantations (Suai) Sdn Bhd v. Ading Anak Layang & Ors [2004] 4 MLJ 180* ***(refd)***
Verama v. Amarugam & Anor [1981] 1 CLJ 180; [1981] CLJ (Rep) 296 HC ***(refd)***
Wan Li Development Pte Ltd v. Kai-Fa Pte Ltd [1986] 2 MLJ 407 ***(refd)***

B **Legislation referred to:**
Land Code (Cap 81) (Sarawak), ss. 133(1), 148(2)(a), (c), 150(1), (3), (4), 151, 256

Other source(s) referred to:
C *The Dictionary of English Law,* 1959, p 710

For the appellant - John Jussem; M/s Battenberg & Talma
For the respondent - Cecil Ha; M/s Kadir, Wong, Lin & Co

Reported by Suresh Nathan

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JUDGMENT

Hamid Sultan Abu Backer JC:

E **[1]** This is an appeal (encl. 180) by the successful bidder (Procon Sdn. Bhd.) in Originating Summons No. KG. 152 of 1993/II (subject matter of Foreclosure proceeding and statutory sale by Financer) against the decision of the learned deputy registrar dated 20 September 2006 whereby the appellant's
F applications (encl. 162) for an order for refund of the purchase price on the ground vacant possession has not been given by the respondent/plaintiff was dismissed with costs.

[2] The respondent opposes the appeal and says as follows:

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(a) the said property in dispute was ordered by court to be sold by auction pursuant to s. 148(2)(c) of the Sarawak Land Code (SLC).

H (b) property was successfully auctioned on 13 August 1996 for the benefit of the successful bidder.

(c) by order dated 5 December 1996 the court ordered that the proceeds from the said auction sale in the sum of RM107,000 be paid out according to a Certificate dated 16 November
I 1996 under s. 151 of the SLC. Contrary to the said order the appellant is making this application for the refund of the

purchase price. Since an order for payment out had already been made by this court; that by itself, is sufficient to defeat the said application as the order is still subsisting and has yet to be fully complied with. Therefore, this court cannot possibly grant another order for payment out without setting aside the previous order.

[3] In support of the argument the respondent relies on the the Federal Court decision of *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 and also relies on *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, where the Federal Court held that a party can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, they cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. Further the respondent says that the granting of the said application would tantamount to lateral attack on the said order for payment out. Besides the respondent adds:

(a) the appellant is not entitled to vacant possession as there was no condition in the sale which required the respondent to deliver vacant possession. Support for the proposition is found in the case of *Malaysian Building Society Bhd v. Univen Sdn Bhd* [2002] 7 MLJ 501 where the court had indicated that the intention of a chargee who wants a sale of the property cannot be wanting in possession.

(b) the respondent had intended to sell the said property under s. 148(2)(c) and had not intended to apply for vacant possession; if that had been the case the appellant would have applied under s. 148(2)(a) of the SLC.

(c) the appellant has not complied with the order of court in that he had failed, refused and/or neglected to submit the memorandum of transfer for the execution by the registrar.

(d) there is no obligation for the respondent to deliver vacant possession under an order of sale by court pursuant to the SLC.

(e) the appellant upon having transferred the property can proceed in law to obtain vacant possession; hence this is not a case where the appellant has no alternative remedies.

(f) if the appellant's argument is accepted, it would have adverse result in all future cases of sales by court by way of auction in that all chargee must guarantee vacant possession in that process.

(g) the appellant in this case had bought the said property with "eyes wide open" and cannot therefore be allowed to rescind the sale without consequence.

[4] The appellant summarises the issues to be tried as follows:

(a) the issue is whether the respondent is under an obligation to give and deliver vacant possession of the charged property upon full payment of the purchase price.

(b) the issue is not whether the appellant should proceed to submit the memorandum of transfer for registration. This is distinct and separate from the issue at hand ie, vacant possession.

and says as follows:

(a) it is clearly evident that the sale of the property should be free of all encumbrances. There is no qualification as to vacant possession as per the order of the court dated 5 December 1996. As such, the obligation of the respondent is not only to have the said property transferred to the appellant but also to give vacant possession of the said property to the appellant, first and foremost.

(b) the land is sold under the provisions of s. 148 of the SLC and the sale is made pursuant to an order of the court as provided under s. 150(1) of the SLC. Section 150 of the SLC implies that the chargee ie, the respondent, who has applied for an order of sale is or in the position of a vendor. The general principle is that it is implicit in a contract of sale that the property is to be sold with vacant possession and, we rely on the case of *Cook v. Taylor* [1942] 1 Ch 349 where Simonds J on the facts of the case stated:

> The second point is this: apart altogether from that particular document, is there, according to the general law, here to be implied a contract of sale with vacant possession? I think the answer to that is in the affirmative. That is, I think, in accordance with the statement in Williams on *Vendor and Purchaser*, 4th ed., p. 201, where

> the learned author says: "So also, where land is expressly or impliedly sold "with vacant possession, a good title is not shown if it is "subject to any tenancy for years or less, which will not "expire before the day fixed or the proper time for completion," and in reference to that statement he cites a number of cases which appear to support the view that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion. I may add that that appears to me to be common sense, for it would be strange if, the vendor saying nothing about the matter which lay within his knowledge and not within the knowledge of the purchaser, the purchaser were to find himself purchasing a property subject to a tenancy of which he could know nothing. Therefore I hold that as a matter of law, on a contract of this character, there is the implied term that vacant possession shall be given on completion.

[5] Further the appellant relies on *Re Crosby's Contract* [1949] All ER 830 where Romer J refers to the passage from Williams *On Vendor And Purchaser* which states:

> In reference to that statement he [the learned author] cites in note (e) a number of cases which appear to me to support the view that where a contract is silent as to vacant possession, but also silent as to anything to which the property is subject, there is impliedly a contract that vacant possession will be given upon completion. I may fairly add that that appears to me to be plainly the common sense of the matter, for it would be strange if, the vendor saying nothing about the matter which lay within his knowledge and not within the knowledge of the purchaser, the purchaser were to find himself purchasing a property subject to a tenancy of which he could know nothing. Therefore I hold as a matter of law upon a contract of this character that there is the implied term that vacant possession shall be given upon completion.

And Romer J concludes that:

> With the guidance of that statement of the general law, it appears to me to be reasonably plain that the conveyance which the landlord here was to give the tenant on the tenant's exercising his option would, by implication, be a conveyance of the property with vacant possession.

[6] In addition the appellant relies on the case of *Cumberland Consolidated Holdings, Ltd. v. Ireland* [1946] All ER 284 where the Court of Appeal held that the expression "vacant possession" is generally assumed to mean possession of property free from any claim of right by the vendor or third party and that the expression extends to a freedom from any physical impediment to enjoyment which would substantially interfere with enjoyment of the property. The court in that case, takes the view that it is the duty of a vendor to eject any unauthorized occupant in order to give vacant possession to a purchaser and the appellant quotes Lord Greene, MR who opined:

> the right to actual unimpeded physical enjoyment was comprised in the right to vacant possession, and the existence of a physical impediment, which substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of the property, to which the purchaser did not expressly or impliedly consent to submit, stood in the same position as an impediment caused by the presence of a trespasser. The appellant had therefore failed to deliver vacant possession.

[7] Further, the appellant says:

(a) the charged property was put up for sale at the instance of the respondent who is the chargee of the said property. As such, the vendor is the respondent. As has been submitted, it is implicit in a contract of sale that property is to be sold with vacant possession unless otherwise stated. This is necessary to complete the sale transaction and for the charged property to be transferred and vested in the name of the appellant as in the case of *M & J Frozen Food Sdn Bhd & Anor. v. Siland Sdn Bhd. & Anor.* [1994] 2 CLJ 15.

(b) under the SLC the doctrine of notice does not apply.

Section 133(1) of the SLC provides as follows:

> 133.(1)) No person, whether or not he has become registered as the proprietor of any interest, who contracts or deals with, or takes a transfer from, a registered proprietor or with or from a person who is entitled to be registered as proprietor shall, except in the case of fraud, be concerned to ascertain the circumstances under which such proprietor, or any previous proprietor, was registered, or to see to the application of the purchase money, or be

affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding.

(c) in order to give vacant possession it is incumbent on the respondent as the vendor to eject not only those lawfully in possession but also any person who has no claim of right.

(d) in this case, there is no special condition or qualification as to vacant possession and in support of the proposition we rely on the case of *Wan Li Development Pte Ltd. v. Kai-Fa Pte Ltd* [1986] 2 MLJ 407, where it was held that vendors were in no position either in law or equity to resist claim of the plaintiff for return of the deposit arising out of the vendor's failure to give vacant possession.

[8] The respondent in reply says as follows:

(a) section 150(3) of the SLC provides that where a sale has been effected the memorandum of transfer shall be executed and shall be presented to the registrar for registration after payment of the purchase price and such other moneys as may be necessary. It is evident that once the condition of payment is met, then it becomes mandatory for the memorandum of transfer to be executed and presented for registration. The appellant has failed to submit the memorandum of transfer to court for execution.

(b) in addition, s. 150(4) states that once the memorandum of transfer had been registered, the estate or interest of the chargor shall vest in the transferee. It is therefore mandatory for the memorandum of transfer to be executed and presented for registration and thereafter, the appellant will then be vested with the interest in the said property.

(c) the appellant had by a letter from their advocates, Messrs Battenberg & Talma, dated 16 August 1996 stated that they will prepare the memorandum of transfer in respect of the said property. They had requested for a copy of the said order for payment out from Messrs Idris & Co, the then advocates of the respondent. Even after a copy of the said order for payment out had been served on them, the appellant and/or their advocates had failed to prepare the memorandum of transfer and submit the same to the registrar. The appellant had not done the same till date.

(d) the remedy for the appellant is to apply for vacant possession of the said property in separate proceedings after they have been registered as the proprietor of the said property. The case of *Pan Wai Mei v. Sam Weng Yee & Anor* [2006] 1 CLJ 914 is an example where the appellant brought proceedings claiming vacant possession.

(e) further, the use of the mandatory word "shall" in sub-sections 150(3) and 150(4) indicates that there is no discretion given as to the registration of the memorandum of transfer. The only pre-condition imposed is "… after payment of the purchase price and such other moneys as may be necessary …". Since the condition precedent had already been fulfilled, there no longer exists any question as to whether the memorandum of transfer should be executed. There are no ambiguities in the sub-sections.

[9] And the respondent relies on the case of *Aminah bte Abas v. Pentadbir Tanah Daerah Kuantan* [2004] 5 CLJ 1 of the respondent's bundle of authorities where the court discussed at length the construction of a mandatory provision in a statute and also the case of *Sop Plantations (Suai) Sdn Bhd v. Ading Anak Layang & Ors* [2004] 4 MLJ 180 where the court looked at a different section of the SLC and held that the word "shall" denotes its mandatory effect.

[10] The respondent further says:

(a) even as early as 17 December 1996, Messrs. Idris & Co. Advocates had written to Messrs. Battenberg & Talma, Advocates for the appellant, stating that the court had not ordered the respondent to give vacant possession of the said property to the appellant. Again, by their letter dated 16 May 1997, Messrs. Idris & Co. Advocates had also explained that any illegal squatters living in the premises have no legal rights capable of being defined as an encumbrance and that any alleged right cannot have priority over the charge. That being the case, the transfer of the said property will be free from encumbrances as no other rights or interests have been registered. There is no reason why the appellant cannot register the memorandum of transfer free from all encumbrances. The respondent is not obliged to deliver vacant possession of the said property to the appellant. The sale had already been concluded when the full purchase price was paid.

It is left to the appellant to present the memorandum of transfer for registration. The respondent is the victim of the appellant's omission, refusal and/or neglect. It is left to the appellant to obtain vacant possession of the said property. Even the appellant has admitted that this obligation is absent from the conditions of sale.

(b) the fact that the appellant has not obtained vacant possession of the said property does not stop them from submitting the memorandum of transfer for registration. Further, the appellant is the beneficial owner of the said property pending registration and therefore should rightly be the party to apply for vacant possession and to submit the memorandum of transfer for registration.

[11] I have considered the submission of the appellant and respondent in great detail. The real issue which I need to deal with in this appeal is whether under a judicial sale pursuant to SLC there is an obligation for the chargee to give vacant possession when admittedly there is nothing in the condition of sale that the respondent is under an obligation to deliver vacant possession.

[12] To determine the issue I need to consider the meaning of encumbrances and to what extent it applies to this appeal in relation to vacant possession as the appellant is asserting that the sale of property was subject to the term "free of all encumbrances" and in consequence, argues that the respondent has a duty and obligation to give vacant possession before the appellant is obliged to perform his part of the bargain.

[13] The appellant assumes that encumbrances necessarily means to include possession of third parties in this case squatters. I do not think so. The term encumbrance has no relationship to possession and the appellant by his own efforts have not produced any authority to show that encumbrance means free from possession of third parties. The learned author's of *The Dictionary of English Law* published in 1959 defines encumbrance at p. 710 as follows:

To encumber land is to make it subject to a charge or liability, eg, by mortgaging it. Encumbrances include not only mortgages and other voluntary charges, but also liens, lites pendentes and registered judgments, etc. See Covenant.

[14] In *Singapore Woodcraft Manufacturing Co. Pte Ltd. v. Mok Ah Sai* [1979] 2 MLJ 166, the Singapore court when dealing with their Land Acquisition opined as follows:

> The word "encumbrances" as appearing in section 18 of the Act has the widest possible meaning. It obviously applies to such recognised interests as leases, sub-leases and mortgages. It also applies to lesser rights such as easements, rights of way, profits a prendre, customary rights and trust rights. Even a mortgagee's rights are removed from the land and affixed to the compensation money.

[15] In *Sheriffa Taibah bte Abdul Rahman v. Lim Kim Som* [1992] 2 SLR 516 again whilst the court was considering their Land Acquisition Act, the court opined that:

> (5) The word 'encumbrance' covers all subsisting third party rights such as leases, rent charges, mortgages, easements, restrictive convenants, and also statutory liabilities which are not merely potential or imposed on all property generally. But a statutory liability which first attaches to the property after the date of the contract must be borne by the purchaser for the risk is on him. A notice of intended acquisition such as a declaration under s. 5 of the Act is not an encumbrance within the conveyancing meaning of that term.

[16] In *Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 CLJ 236 Gopal Sri Ram JCA considered the term encumbrance in the context of private caveats and observed:

> With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word 'encumbrances' in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, 'encumbrances' in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.
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> The first is *T Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the Board said (at p 269):

> In the National Land Code, it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered, they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered [*460] proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.
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> The second is *Letchumanan Chettiar v. Palaniappa Chettiar* [1983] 1 MLJ 6, where (at p 9) Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *T Damodaran v. Choe Kuan Him*.

[17] In all the above definition there is one common element and that is that the term encumbrance must be related to the quality of the title which may diminish the value of the property and not any obstruction to the enjoyment of the property as in this case where the appellant is saying that vacant possession has not been given by the respondent.

[18] Thus it is clear that "Free of all encumbrances" does not mean that the chargee must give vacant possession unless the terms of sale expressly say so. I have on 7 March 2007 the date of the hearing of the appeal brought to the attention of the appellant that the authorities they have cited all relates to common law principles relating to sale of property and is not

A relevant to judicial and/or statutory sale and requested for authorities directly relating to the case. No additional authorities were submitted.

[19] In this case the sale was pursuant to s. 148(2)(c) and not B under 148(2)(a). That section says as follows:

> (2) If the chargor fail to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court:
>
> C (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land.
>
> (b) to receive the rents and profits of the charged land; or
>
> (c) for the sale of the charged land … .

D It is clear from the section that the respondent had elected to go for judicial sale and not for other remedies in the section. The order for sale was granted and the property was purchased by the appellant pursuant to s. 150 of the SLC. Section 150 of the SLC E reads as follows:

> (1) Where any competent court orders the sale of any land subject to a charge, it shall notify the Superintendent of its decision and shall serve a notice of the intended sale upon the chargor and upon the registered proprietor of every other estate or interest in F the land. It shall also give notice of the intended sale by advertisement in the Gazette and by such other means as it may deem sufficient. The sale shall be by public auction or tender or such other mode of sale as may be directed by the court subject to such conditions of sale as shall be approved by the court. The court shall also fix the date of the sale, which shall be not less G than thirty days from the date of the order of sale, and shall authorize such other acts as may be necessary for the conduct of the sale. A reserve price shall be put on the land which shall be approximately equal to its estimated fair market value.
>
> H (2) The chargee and the holder of a licence for the establishment of a planted forest granted under section 65B of the Forests Ordinance (Cap. 126 (1958 Ed.)) may be a bidder at any sale to which subsection (1) relates and become the purchaser of the land or any part thereof.
>
> I (3) Where a sale has been effected either to the chargee or to any other person, a memorandum of transfer shall, after payment of the purchase price and such other moneys as may be necessary, be executed in favour of the transferee by such person,

including an officer of the court, as the court may order and shall, with the necessary document of title, be presented to the Registrar for registration.

(4) Upon the registration of any memorandum of transfer executed in accordance with this section, the estate or interest of the chargor therein expressed to be transferred shall vest in the transferee, freed and discharged from the liability under the charge under which the power of sale has been exercised and from any other estate or interest, except an estate or interest which has priority over the charge or which by reason of the consent of the charge is binding on him, and the Registrar may make in the Register any entry necessary to show that every such liability, estate or interest has been so determined.

[20] In consequence, the appellant and respondent are subject to all the statutory terms related to the sale and cannot rely on common law principles relating to the terms and conditions of purchase unless they have been expressly agreed by the parties. In this case, I find no such agreement to support the appellant's contention that he is entitled to vacant possession of the property in addition to the transfer. The consequence of the sale by auction is that the respondent becomes a bare trustee for the appellant and his interest in the property is only the sale price subject to s. 151 of the SLC which reads as follows:

Purchase money arising from any sale under section 150 shall be applied in the order following:

(a) in payment of any rents, taxes, rates and other fees due to the Government;

(b) in payment of the expenses and costs of, and incidental to, the notices, summonses and sale;

(c) in payment of the moneys which may then be due or owing to the chargee;

(d) in payment of subsequent charges, if any, in order of their priority and the surplus, if any, shall be paid to the chargor.

[21] Support for the above propositions can be garnered from many cases to mention a few are as follows:

(a) In *Lysaght v. Edwards* [1876] 2 Ch. D 499 Jessel MR observed:

A It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of the purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

(b) A purchaser derives beneficial ownership in land when the sale and purchase agreement for the sale of land is concluded. C (see *Ahmad bin Salleh & Ors v. Rawang Hills Resort Sdn. Bhd.* [1995] 4 CLJ 197).

(c) The Court of Appeal in *Aik Ming (M) Sdn. Bhd. v. Chang Chin Chuen* [1995] 3 CLJ 639 stated that one is not a *bona fide* purchaser until one has paid all the money under a D contract of sale.

(d) In *Punca Klasik Sdn. Bhd. v. All Persons in occupation* [1995] 4 BLJ 337, the court stated that it is trite that our land laws are governed by the code which does not allow the law to be E tempered with equity. (see *Verama v. Amarugam & Anor* [1981] 1 CLJ 180; [1981] CLJ (Rep) 296).

(e) In *Hotel Ambassador Sdn Bhd v. Seapower Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 the court opined that F where an order for sale under s. 256 has been issued any lessee whose term has expired and continues to be there will be treated as trespassers or at the most bare licensees.

[22] Though the National Land Code and the SLC is not *pari* G *materia* it cannot be denied that the principles applicable in the construction of the statutory provisions and the relationship to the common law principles as enunciated in all the cases related to statutory provisions to a large extent will be relevant and applicable.

H **[23]** To my mind SLC is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience. SLC does not prevent the court from doing equity where the rights of third parties have not I intervened. In a sale of land under the SLC, the estate and interest in the land remains with the proprietor until he has done

all that is necessary to divest the estate out of himself and vest it in the transferee. Completion under the SLC refers to that stage of the conveyance when the land is registered with the Registrar of Titles. Support for this proposition can be found in the following cases: (i) *OH Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159 (PC); (ii) *Bhagwan Singh & Co. Sdn Bhd v. Hock Hin Bros Sdn Bhd* [1986] 2 CLJ 224; [1986] CLJ (Rep) 300 (iii) *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank* [1995] 4 CLJ 283 (CA); (iv) *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713 (CA); (v) *M & J Frozen Food Sdn Bhd v. Si land Sdn Bhd* [1994] 2 CLJ 15: even though they are related to the National Land Code.

[24] In my view, I take it that an order of court under a judicial or statutory sale must be respected and must be complied with, failure of which may lead to contempt proceedings to compel the recalcitrant party to perform his part of his bargain more so when parties have voluntarily by conduct, dragged the court to aid them in a private transaction. Any non compliance with the statutory term of sale requires the court to make, if necessary punitive orders to ensure compliance and the court will not hesitate to take pro active steps to dismiss frivolous application in limine, provided the aggrieved party approaches the court without delay.

[25] In this case, the appellant had voluntarily bidded for the property and consented to various orders of the court. Without performing the said order or making an application for stay of the order, the appellant files the application for refund without legal basis (even under the law of contract) and thereby turning the character of the application to one which is frivolous, vexatious and an abuse of the process of court.

[26] Therefore, for reasons stated above, I dismiss the appeal of the appellant with costs and order the costs to be taxed and paid to the respondent.